

FILED

AUG 22 2016

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIAUNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re: ) Case No. 15-23586-B-7  
 )  
 DIANE KAY McCRAY, ) Adversary No. 15-2184  
 )  
 Debtor(s). )  
 )  
 \_\_\_\_\_ )  
 )  
 GEOFFREY RICHARDS, Chapter 7 )  
 Trustee, )  
 )  
 Plaintiff(s), )  
 )  
 v. )  
 )  
 STARR'S BUILDING SUPPLY, INC., )  
 a California corporation, )  
 )  
 Defendant(s). )  
 \_\_\_\_\_ )

**NOT FOR PUBLICATION****DECISION AFTER TRIAL****I. INTRODUCTION**

This is an action by plaintiff Geoffrey Richards against  
 defendant Starr's Building Supply, Inc. Plaintiff is the trustee  
 appointed in the underlying chapter 7 case filed on April 30,  
 2015, by debtor Diane Kay McCray as case no. 15-23586. Defendant  
 is a California corporation. Based on a pre-petition state court  
 default judgment entered against the debtor, defendant is also a  
 creditor in debtor's chapter 7 case.<sup>1</sup>

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<sup>1</sup>Based on that judgment, on September 10, 2015, defendant  
 filed proof of claim no. 16. The proof of claim states a claim  
 amount of \$834,968.45, of which \$200,000 is secured and the  
 balance of \$634,968.45 is unsecured.

1 The complaint in this adversary proceeding was filed on  
2 September 17, 2015. The complaint and summons were served on  
3 defendant on September 18, 2015. An amended complaint was filed  
4 and served on defendant on October 8, 2015. Defendant answered  
5 the amended complaint on November 4, 2015. Defendant's answer to  
6 the amended complaint included a "cross-claim" against the  
7 plaintiff which the court designated as a counterclaim and  
8 dismissed with prejudice in an order filed on April 3, 2016.

9 Defendant's answer admits the court's jurisdiction under 28  
10 U.S.C. §§ 1334(b) and 157(a). It also admits that this adversary  
11 proceeding is a core matter under 28 U.S.C. §§ 157(b)(2)(A), (B),  
12 (F), and (K). And it admits venue is proper under 28 U.S.C. §  
13 1409(a). Nevertheless, to the extent this adversary proceeding  
14 may ever be determined to be a matter that a bankruptcy judge may  
15 not hear and determine without consent, the parties consent to  
16 such determination by a bankruptcy judge. See 28 U.S.C. §  
17 157(c)(2).

18 The amended complaint alleges seven claims for relief: (1) a  
19 § 547 preferential transfer and avoidance claim; (2) a claim to  
20 declare defendant's liens on the debtor's properties invalid;  
21 (3) breach of contract; (4) interference with business relations;  
22 (5) an objection to the defendant's proof of claim; (6) equitable  
23 subordination; and (7) slander of title. Plaintiff seeks  
24 damages, including attorney's fees, on the third, fourth, and  
25 seventh claims for relief and attorney's fees as the prevailing  
26 party on the first claim for relief.

27 Trial in this matter was held and concluded on June 27,  
28 2016. Appearances were noted on the record. At the start of the

1 trial the court made several pre-trial rulings on the record in  
2 open court.<sup>2</sup> Those rulings are ratified and incorporated into  
3 this decision by reference. The court also requested post-trial  
4 briefing on the issue of attorney's fees which the parties filed  
5 on July 11, 2016.<sup>3</sup>

6 Pursuant to Federal Rule of Evidence ("Evidence Rule") 201,  
7 the court also takes judicial notice of the docket in this  
8 adversary proceeding, the docket in the debtor's chapter 7 case,  
9 the docket in the related chapter 7 case filed in this court on  
10 April 17, 2015, by J.F. McCray Plastering, Inc. ("JFMPI") as Case  
11 No. 15-23164, and the docket in the related case filed in the  
12 Sacramento County Superior Court captioned *Starr's Building*

13  
14 <sup>2</sup>Defendant's objections to plaintiff's direct testimony  
15 declarations and exhibits were overruled. Plaintiff's objection  
16 to defendant's direct testimony declaration and exhibits were  
17 overruled in part and sustained in part: The objection based on  
18 the timeliness of disclosures prior to trial was overruled and  
19 the objection under Federal Rule of Civil Procedure ("Civil  
20 Rule") 37(c)(1) (applicable by Federal Rule of Bankruptcy  
21 Procedure ("Bankruptcy Rule") 7037) and Local Bankruptcy Rule  
22 9017-1(d) was granted, which resulted in an exclusion of  
23 defendant's witnesses and exhibits not previously disclosed as  
24 required by Civil Rule 26(a)(1)(A) (applicable by Bankruptcy Rule  
25 7026) and the Order to Confer on Initial Disclosures and Setting  
26 Deadlines entered on September 17, 2015. Following that  
27 exclusionary ruling, plaintiff's attorney stated that plaintiff  
28 did not object to the admission of defendant's direct testimony  
declaration and exhibits. Plaintiff also elected to not call any  
witnesses and to rest on the written record admitted into  
evidence consisting of the parties' direct testimony declarations  
and exhibits.

<sup>3</sup>Defendant filed an unauthorized declaration of Steve Boeger  
on July 11, 2016, with its supplemental brief. Mr. Boeger is  
also an undisclosed witness subject to the court's exclusionary  
ruling explained in footnote 2, supra. Therefore, plaintiff's  
objection to Mr. Boeger declaration filed on July 12, 2016, is  
sustained, and Mr. Boeger's declaration is stricken from the  
docket.

1 *Supply, Inc. v. J.F. McCray Plastering, Inc., et al.*; Case No.  
2 34-2014-00167272 ("State Court Litigation"). See U.S. ex rel.  
3 Robinson Rancheria Citizen's Council v. Borneo, 971 F.2d 244, 248  
4 (9th Cir. 1992); U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir.  
5 1980).

6 This decision constitutes the court's findings of fact and  
7 conclusions of law made pursuant to Civil Rule 52(a) applicable  
8 by Bankruptcy Rule 7052.

## 9 **II. FACTS**

10 From February 18, 2013, through June 30, 2014, defendant  
11 provided drywall and other building supplies to JFMPI. Defendant  
12 supplied JFMPI with drywall and other building supplies for a  
13 construction project on which JFMPI was a subcontractor.

14 On or about January 8, 2014, defendant received an  
15 Application for Credit from an entity identified on the credit  
16 application as J.F. McCray, Inc. ("JFMI"). However, the tax  
17 identification number in the box on the credit application marked  
18 "FED. TAX ID" is identical to the tax identification number  
19 included on JFMPI's chapter 7 petition. The debtor signed the  
20 credit application as "CEO" and she signed JFMPI's chapter 7  
21 petition as an "officer." The credit application also includes a  
22 "Continuing Guarantee" section which the debtor signed as a  
23 "Guarantor."

24 Anticipating that it would not be paid for the drywall and  
25 construction supplies it provided JFMPI, defendant initiated the  
26 State Court Litigation on or about August 6, 2014. The complaint  
27 filed in that state court action named JFMPI, the debtor, and  
28 another individual as defendants. The debtor was sued as a

1 guarantor. None of the defendants answered the complaint or  
2 otherwise defended. Accordingly, on or about November 26, 2014,  
3 the state court entered a default judgment in the amount of  
4 \$731,387.43 against all defendants. A notice of the entry of  
5 that judgment was filed in the state court on December 26, 2014.

6 Based on the judgment entered in the State Court Litigation,  
7 on or about December 29, 2014, defendant recorded a lis pendens  
8 against the debtor's real property located at 2590 South River  
9 Road, West Sacramento, Yolo County, California ("River Road  
10 Property"). Thereafter, defendant recorded abstracts of judgment  
11 in Yolo County on January 30, 2015, in Sacramento County on  
12 February 18, 2015, in Solano County on February 23, 2015, and in  
13 Los Angeles County on March 11, 2015.

14 Shortly after the debtor filed her chapter 7 petition on  
15 April 30, 2015, plaintiff and his attorney obtained and reviewed  
16 a preliminary title report for the River Road Property. They  
17 formed an opinion that defendant's lis pendens was improper  
18 because it was based on a judgment entered in an action that did  
19 not involve real estate or real estate claims. They also  
20 believed that the abstract of judgment recorded in Yolo County  
21 was avoidable as a § 547 preferential transfer.<sup>4</sup> Without these  
22 encumbrances, plaintiff believed that the River Road Property

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23  
24 <sup>4</sup>In addition to the River Road Property, plaintiff also  
25 learned that the debtor transferred three other properties, one  
26 in Yolo County and two in Sacramento County, to family members  
27 shortly before she filed her chapter 7 petition. Those  
28 properties were also encumbered with the liens created by the  
abstracts of judgment recorded in the respective counties. The  
recovery of those properties is dealt with in separate litigation  
by the plaintiff. Defendant's liens on those properties created  
by the recorded abstracts of judgment have since been released.

1 would have substantial equity for the benefit of the estate and  
2 creditors.

3 In an effort to liquidate the River Road Property, in June  
4 and July of 2015 the parties' attorneys discussed defendant's  
5 release of its lis pendens and the lien on that property created  
6 by the recorded abstract of judgment. Although defendant's  
7 attorneys stated they were unfamiliar with bankruptcy law and  
8 required time to look into the voidability of the abstract of  
9 judgment recorded in Yolo County, following a conversation on  
10 July 2, 2015, plaintiff's attorney sent defendant's attorney an  
11 email that stated defendant agreed to release its lis  
12 pendens/lien on the River Road Property if plaintiff found a  
13 buyer for the property. Notably, that email makes no mention of  
14 any promise by the plaintiff to refrain from suing defendant to  
15 avoid the lis pendens and lien on the River Road Property (or to  
16 refrain from suing the defendant for anything else) in exchange  
17 for defendant's promise to sign lis pendens/lien release  
18 documents.

19 Thereafter, on August 21, 2015, plaintiff's attorney sent  
20 defendant's attorney lis pendens/lien release documents which he  
21 requested defendant sign and return by August 28, 2015. At about  
22 that time, and contingent on bankruptcy court approval, plaintiff  
23 contracted with a buyer for the sale of the River Road Property  
24 for \$612,000 after receiving and reviewing several offers.  
25 Plaintiff anticipated a hearing to approve that sale sometime in  
26 September 2015.

27 On September 3, 2015, defendant's attorney confirmed receipt  
28 of the lis pendens/lien release documents and requested

1 additional time for defendant to sign and return the documents.  
2 Defendant's attorney also asked plaintiff's attorney for  
3 additional information about the sale.

4 Then, in an email sent on September 8, 2015, defendant's  
5 attorney informed plaintiff's attorney that defendant decided it  
6 would not sign the lis pendens/lien release documents. In a  
7 separate email later that same date, defendant's attorney  
8 explained that defendant was not comfortable signing the lis  
9 pendens/lien release documents because it lacked information  
10 about the sale, buyer, and an anticipated condemnation proceeding  
11 involving the property. In a response later that evening,  
12 plaintiff's attorney declined to identify the buyer but offered  
13 to further discuss the sale and condemnation proceedings with  
14 defendant's attorney.

15 Three days later, on September 11, 2015, plaintiff's  
16 attorney sent defendant's attorney a letter that plaintiff's  
17 attorney refers to in his declaration as a "final demand for  
18 defendant to sign the release documents." That letter outlined  
19 the parties' prior communications, restated plaintiff's position  
20 that defendant agreed to release its lis pendens/lien on the  
21 River Road Property if a buyer was found, and confirmed that a  
22 buyer was found. Significantly, for the first time, that letter  
23 mentioned litigation and included a threat by plaintiff to sue  
24 defendant if defendant did not sign and return the lis  
25 pendens/lien release documents.

26 Defendant's attorney responded in an email on September 17,  
27 2015, in which he stated he was happy to cooperate with the  
28 plaintiff but defendant could not sign the lis pendens/lien

1 release documents because it still lacked sufficient information  
2 about the buyer, sale, and condemnation proceedings. Defendant's  
3 response was apparently unpersuasive. At 2:20 p.m. on September  
4 17, 2015, plaintiff's attorney sent defendant's attorney another  
5 email that included the complaint that commenced this adversary  
6 filed earlier that day at 12:58 p.m.

7 As a result of defendant's decision to not sign the lis  
8 pendens/lien release documents, plaintiff was unable to set a  
9 hearing and obtain bankruptcy court approval for the sale of the  
10 River Road Property in September 2015 as he initially  
11 anticipated. The delay caused by defendant's decision also  
12 necessitated plaintiff's intervention in the State Court  
13 Litigation to respond to a notice of automatic stay and expunge  
14 the lis pendens on the River Road Property, which the state court  
15 ordered expunged on November 16, 2015, and expunged in an order  
16 dated December 3, 2015. And it also resulted in the estate's  
17 additional involvement in River Road Property condemnation  
18 proceedings initiated by the West Sacramento Area Flood Control  
19 Agency and related litigation filed in Yolo County Superior  
20 Court.

21 Nevertheless, on or about December 8, 2015, defendant  
22 provided plaintiff with a withdrawal of the lis pendens and a  
23 partial satisfaction of the state court judgment as it pertained  
24 to the River Road Property. About a week later, on December 14,  
25 2015, plaintiff filed a motion to approve the sale of the River  
26 Road Property to Elizabeth Stefanik for \$612,000. The motion to  
27 approve the sale and the attached sale agreement confirmed that  
28 the sale to Ms. Stefanik was contingent on bankruptcy court



1 approval. That motion was heard on January 12, 2016, and, after  
2 substantial overbidding that occurred in open court, the court  
3 approved the sale of the River Road Property to a different  
4 buyer, Kosla Properties, LLC, for \$730,000. An order approving  
5 that sale was filed on January 13, 2016.

6 On or about April 4, 2016, defendant voluntarily released  
7 all remaining liens created by the abstracts of judgment recorded  
8 in Yolo, Sacramento, Solano, and Los Angeles Counties.

### 9 **III. DISCUSSION**

#### 10 A. First Claim for Relief (Avoidance of § 547 Preferential 11 Transfers) and Second Claim for Relief (Determination and Declaration of Lien Validity)

##### 12 1. Merits

13 The first claim for relief alleges a § 547 preference claim.  
14 It alleges the trustee is entitled to avoid liens that defendant  
15 acquired on the debtor's real properties when it recorded  
16 abstracts of judgment in Yolo, Sacramento, Solano, and Los  
17 Angeles Counties. The second claim for relief seeks a  
18 declaration that those liens, and the lis pendens recorded  
19 against the River Road Property, are invalid.

20 The lis pendens was ordered expunged on or about November  
21 16, 2015, and formally expunged in an order entered in the State  
22 Court Litigation on or about December 3, 2015. Defendant  
23 voluntarily released all of the liens created by the abstracts of  
24 judgment recorded in each of the referenced counties on or about  
25 April 4, 2016. Inasmuch as defendant no longer has any liens to  
26 avoid or declare invalid, the first and second claims for relief  
27 are moot. The court has no power to adjudicate moot claims. See  
28 Goldin v. Bartholow, 166 F.3d 710, 718 (5th Cir. 1999) (citations

1 omitted).

2 Therefore, to the extent the first and second claims for  
3 relief request a judgment avoiding and invalidating non-existent  
4 liens, those claims for relief are dismissed as moot.

5 2. Attorney's Fees on the § 547 Claim

6 Plaintiff requests attorney's fees as the prevailing party  
7 on the § 547 preference claim alleged in the first claim for  
8 relief. Plaintiff maintains he is the prevailing party because  
9 he achieved the purposes of this claim when defendant voluntarily  
10 released its lis pendens on the River Road Property and the liens  
11 created by the recorded abstracts of judgment. However, even  
12 assuming plaintiff is the prevailing party on the first claim for  
13 relief, plaintiff has not demonstrated that attorney's fees are  
14 recoverable on the § 547 preferential claim under California law.  
15 Therefore, judgment for attorney's fees will not be entered for  
16 the plaintiff.

17 The Bankruptcy Code does not provide a general right to  
18 recover attorney's fees. Heritage Ford v. Baroff (In re Baroff),  
19 105 F.3d 439, 441 (9th Cir. 1997). Nevertheless, a prevailing  
20 party on a bankruptcy law claim may recover attorney's fees if  
21 recovery is permitted under a state statute or contract. Cohen  
22 v. de la Cruz, 523 U.S. 213, 220-21 (1998); Cardenas v. Shannon  
23 (In re Shannon), - B.R. -, 2016 WL 4009673 at \*11 (9th Cir. BAP  
24 2016); Redwood Theaters, Inc. v. Davison (In re Davison), 289  
25 B.R. 716, 722 (9th Cir. BAP 2003).

26 Plaintiff relies on California Civil Code § 1717 as the  
27 basis for an award of attorney's fees. Plaintiff asserts § 1717  
28 applies because the § 547 preference claim arose out of the

1 guarantee in the credit application and § 1717 makes a unilateral  
2 fee provision in that agreement mutual. The court disagrees with  
3 plaintiff's initial premise, namely, that the § 547 preference  
4 claim arose from the guarantee.

5 California Civil Code § 1717 states:

6 In any action on a contract, where the contract  
7 specifically provides that attorney's fees and costs,  
8 which are incurred to enforce that contract, shall be  
9 awarded either to one of the parties or to the  
10 prevailing party, then the party who is determined to  
be the prevailing party on the contract, whether he or  
she is the party specified in the contract or not,  
shall be entitled to reasonable attorney's fees in  
addition to other costs.

11 By its plain terms, § 1717 only permits an award of  
12 attorney's fees in an action "on a contract." Davison, 289 B.R.  
13 at 722. If a bankruptcy court does not need to determine whether  
14 a contract is enforceable, or if a contract is not an integral  
15 part of the bankruptcy court's consideration, then a federal  
16 bankruptcy claim is not an action "on a contract" within the  
17 meaning of § 1717. Bos v. Board of Trustees, 818 F.3d 486,  
18 489-90 (9th Cir. 2016); Davison, 289 B.R. at 723; see also  
19 Arciniega v. Clark (In re Arciniega), 2016 WL 455428 at \*13-14  
20 (9th Cir. BAP 2016). For example, in Bos, the Ninth Circuit  
21 explained that a claim arose entirely under the Bankruptcy Code  
22 and was not "on a contract" within the meaning of § 1717 when it  
23 did not require the bankruptcy court to determine whether or to  
24 what extent contracts in the case were enforceable or violated.  
25 Id. at 490. The court noted those questions had been answered in  
26 arbitration and confirmed by a state court. Id.

27 Here, like Bos, resolution of the § 547 preference claim  
28 would not require the court to determine whether or to what

1 extent the guarantee is enforceable against the debtor and/or  
2 whether it was violated or even applicable. That is because,  
3 again like Bos, the debtor's liability on that guarantee was  
4 resolved and established by a valid and final judgment entered  
5 against the debtor in the State Court Litigation.<sup>5</sup> That means  
6 the § 547 preference claims alleged in the first claim for relief  
7 arose from the judgment entered against the debtor, not the  
8 guarantee.<sup>6</sup> That also means the guarantee was not (and would not  
9 have been) integral to the § 547 preference avoidance claim. In  
10 short, the first claim for relief is not a claim "on a contract"  
11 and § 1717 is inapplicable. Therefore, attorney's fees are

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12  
13 <sup>5</sup>The debtor did not appeal from that judgment. In an  
14 unlimited civil action such as the State Court Litigation, i.e.,  
15 an action over \$25,000, if no notice of appeal is filed, a  
16 judgment becomes final on the earlier of (1) 60 days after  
17 service of a notice of entry of judgment; or (2) 180 days after  
18 the entry of the judgment. See California Rules of Court Rule  
8.104(a). Notice of entry of the judgment entered against the  
debtor was served on December 26, 2014. No timely notice of  
appeal was thereafter filed which means the judgment entered  
against the debtor became final on February 24, 2015.

19 <sup>6</sup>Notably, the debtor views her liability to the defendant as  
20 arising from the judgment and not the guarantee. The debtor  
21 listed her debt to the defendant in Schedule F as a non-  
22 contingent, liquidated, and undisputed debt in the amount of  
23 \$731,000 based on the judgment entered against her in the State  
24 Court Litigation. At a minimum, the debtor's statement in  
25 Schedule F is an evidentiary admission by the debtor admissible  
26 under Evidence Rule 801(d)(2). In re Applin, 108 B.R. 253, 259  
27 (Bankr. E.D. Cal. 1989). Even if that admission is not binding  
28 on the plaintiff in his capacity as the trustee in the debtor's  
chapter 7 case, see Kirkland v. B-Line, LLC (In re Kirkland), 572  
F.3d 838, 840-41 (10th Cir. 2009), it nevertheless has  
evidentiary value as a statement by the debtor made under penalty  
of perjury, see Fed. R. Bankr. P. 1008, and is evidence of the  
basis of the debtor's debt to the defendant (and the defendant's  
claim against the debtor) in the debtor's chapter 7 case.  
Perfectly Fresh Farms, Inc. v. U.S. Dep't of Agric., 692 F.3d  
960, 969 (9th Cir. 2012).

1 unrecoverable on what is exclusively a bankruptcy law claim under  
2 § 547 in the first claim for relief.

3 The other provision upon which plaintiff relies, California  
4 Civil Code § 1021, is equally inapplicable. In the absence of a  
5 statutory basis for the recovery of attorney's fees, California  
6 Civil Code § 1021 provides for recovery of attorney's fees under  
7 an agreement. Section 1021 states as follows:

8 Except as attorney's fees are specifically provided for  
9 by statute, the measure and mode of compensation of  
10 attorneys and counselors at law is left to the  
11 agreement, express or implied, of the parties; but  
12 parties to actions or proceedings are entitled to their  
13 costs, as hereinafter provided.

14 Here, as explained in § III.B., infra, there is no  
15 enforceable agreement between the plaintiff and the defendant  
16 because there is no evidence that defendant's promise to sign lis  
17 pendes/lien release documents is supported by consideration. And  
18 even if that promise created an enforceable agreement, there is  
19 no evidence it included any provision for the payment of any  
20 attorney's fees.

21 Therefore, for the foregoing reasons, plaintiff's request  
22 for attorney's fees as a prevailing party on the § 547 preference  
23 claim in the first claim for relief is denied with prejudice.  
24 Judgment for attorney's fees will not be entered for the  
25 plaintiff on that claim.

26 B. Third Claim for Relief (Breach of Contract)

27 The third claim for relief alleges a breach of contract  
28 claim. Under the California Civil Code, there are four essential  
elements to the existence of a contract: (i) parties capable of  
contracting, (ii) their consent, (iii) a lawful object, and (iv)

1 sufficient cause or consideration. See Cal. Code Civ. § 1550;  
2 Lopez v. Charles Schwab & Co., 118 Cal. App. 4th 1224, 1230  
3 (2004). The breach of contract claim in the third claim for  
4 relief fails on the fourth element, *i.e.*, lack of consideration.

5 During the argument phase of trial, the court asked the  
6 parties' attorneys to identify the consideration for the  
7 defendant's promise to the plaintiff to sign lis pendens/lien  
8 release documents. Plaintiff stated that the consideration for  
9 that promise was a forbearance from litigation. Defendant, on  
10 the other hand, stated there was none. Defendant is correct.

11 Although the July 2, 2015, email from plaintiff's attorney  
12 to defendant's attorney confirmed plaintiff's promise to release  
13 its lis pendens/lien on the River Road Property if plaintiff  
14 found a buyer for the property, there is no mention in that email  
15 (or in any of the other emails or the direct testimony  
16 declarations) of any promise by the plaintiff to not sue  
17 defendant over the lis pendens/lien (or any other matter) in  
18 exchange for defendant's promise to sign the lis pendens/lien  
19 release documents. In fact, the first mention of any litigation  
20 by the plaintiff against the defendant is in the September 11,  
21 2015, demand letter from plaintiff's attorney to the defendant's  
22 attorney. That letter, however, is a threat to initiate  
23 litigation against the defendant after defendant informed  
24 plaintiff it decided to not sign the release documents made long  
25 after the July 2, 2015, email that referenced the defendant's  
26 promise to sign those documents.

27 In short, the court finds no evidence that defendant's  
28 promise to sign lis pendens/lien release documents is supported

1 by any "act or promise-in-return, bargained for and given in  
2 exchange [by the plaintiff] for the [defendant's] initial  
3 promise." Synnex Corp. v. Wattles, 2012 WL 5524953 at \*7 (N.D.  
4 Cal. 2012) (citation omitted). In other words, defendant's  
5 promise is not supported by consideration. In the absence of  
6 consideration there is no enforceable contract, and in the  
7 absence of an enforceable contract there can be no recovery on a  
8 claim for breach of contract. U.S. Ecology, Inc. v. State, 92  
9 Cal. App. 4th 113, 128-29 (2001) (citation omitted) ("A promise  
10 is not enforceable unless consideration was given in exchange for  
11 the promise.").

12 Alternatively, even if defendant's promise to sign lis  
13 pendes/lien release documents was supported by consideration, the  
14 court would nevertheless conclude that plaintiff failed to carry  
15 his burden of demonstrating that the estate suffered damages as a  
16 result of defendant's breach of that promise. That breach, if  
17 there was one, resulted in a sale of the River Road Property in  
18 January 2016 for \$730,000. That is \$118,000 over the \$612,000  
19 sales price plaintiff expected to receive upon the sale of the  
20 property in September 2015. Thus, even if the defendant's breach  
21 of its promise to sign the lis pendens/lien release documents  
22 delayed the sale of the River Road Property and events during  
23 that delay caused the estate to incur \$59,000 in attorney's fees,  
24 the estate still netted \$59,000 more than it expected to receive  
25 upon sale of the property to Ms. Stefanik in September 2015.

26 Therefore, for the foregoing reasons, judgment on the third  
27 claim for relief will be entered for the defendant and against  
28 the plaintiff with plaintiff taking nothing on the breach of



1 contract claim.

2 C. Fourth Claim for Relief (Interference With Business  
3 Relations)

4 The fourth claim for relief is captioned as a claim for  
5 "Interference with Business Relations." However, ¶¶ 43 and 44 of  
6 the amended complaint allege that when defendant decided to not  
7 sign the lis pendens/lien release it "knew the [plaintiff] was in  
8 a written and enforceable contract to sell the River Road  
9 Property . . . [and defendant] intended to disrupt *that contract*  
10 and the River Road Sale[.]" (Emphasis added). Page 14 of  
11 plaintiff's trial brief also recites the elements of - and argues  
12 that the fourth claim for relief is - a claim for intentional  
13 interference with contractual relations. Therefore, the court  
14 construes the fourth claim for relief as a claim for intentional  
15 interference with contract.

16 Under California law, the elements of a tortious  
17 interference with contract claim are: (1) a valid contract  
18 between plaintiff and a third party; (2) defendant's knowledge of  
19 the contract; (3) defendant's intentional acts designed to induce  
20 breach or disruption of the contract; (4) actual breach or  
21 disruption; and (5) resulting damage. Name.Space, Inc. v.  
22 Internet Corp. for Assigned Names and Numbers, 795 F.3d 1124,  
23 1133 (9th Cir. 2015); Pacific Gas & Electric Co. v. Bear Stearns  
24 & Co., 50 Cal. 3d. 1118, 1126 (1990). However, interference with  
25 a contingent contract where the contingency never occurs will not  
26 support an intentional interference claim. Meadow Ltd. P'ship v.  
27 Heritage Sav. & Loan Ass'n, 639 F. Supp. 643, 652 (E.D. Va.  
28 1986).



1 Plaintiff asserts that defendant interfered with his  
2 contract for the sale of the River Road Property to Ms. Stefanik  
3 by not voluntarily removing its lis pendens and releasing the  
4 lien on the property created by the abstract of judgment recorded  
5 in Yolo County. The contract between plaintiff and Ms. Stefanik  
6 was contingent on bankruptcy court approval. That contingency  
7 never occurred because the River Road Property was ultimately  
8 sold to Kosla through the overbid process that took place in open  
9 court on January 12, 2016. Thus, even assuming that defendant's  
10 decision to not sign the release documents made plaintiff's sale  
11 of the River Road Property more costly and time-consuming, all  
12 that plaintiff has established is that defendant interfered with  
13 a contingent contract where the contingency never occurred. And,  
14 as stated above, that will not support an intentional  
15 interference with contract claim.

16 Therefore, for the foregoing reasons, judgment on the fourth  
17 claim for relief will be entered for the defendant and against  
18 plaintiff with plaintiff taking nothing on the intentional  
19 interference with contract claim.

20 D. Fifth Claim for Relief (Claim Objection)

21 The fifth claim for relief is plaintiff's objection to the  
22 \$834,968.35 proof of claim that defendant filed on September 10,  
23 2015. Based on the abstracts of judgment recorded in Yolo,  
24 Solano, Sacramento, and Los Angeles Counties, defendant filed  
25 that proof of claim as a \$200,000 secured claim and an unsecured  
26 claim for the balance of \$634,968.45.

27 Plaintiff raises three objections to defendant's claim: (1)  
28 it is unenforceable against the debtor because (a) the debtor

1 guaranteed JFMI's and not JFMPI's debts and/or (b) defendant is  
2 not the beneficiary of the debtor's guarantee; (2) defendant's  
3 claim is not a secured claim; and (3) the amount of defendant's  
4 claim is overstated.

5 1. Disallowance

6 Plaintiff's request for disallowance of defendant's claim in  
7 its entirety is an attempt by the plaintiff to re-litigate the  
8 judgment entered against the debtor in the State Court  
9 Litigation. Plaintiff maintains the claim is unenforceable  
10 against the debtor because the debtor is not liable on the  
11 guarantee in the credit agreement. However, as explained in §  
12 III.A.2, supra, the debtor's liability on the guarantee was  
13 established through the state law default judgment process which  
14 resulted in a valid and final judgment entered against the debtor  
15 in the State Court Litigation. Indeed, the debtor concedes as  
16 much in her Schedules.

17 Additionally, the debtor did not appeal from the judgment  
18 entered against her and thereby relinquished any right to  
19 challenge her liability. Plaintiff, as the trustee appointed in  
20 the debtor's chapter 7 case, "succeeds to the debtor's rights to  
21 the extent that those rights exist at the time of the  
22 [plaintiff's] appointment." In re Merry-Go-Round Enter., Inc.,  
23 229 B.R. 337, 345 (Bankr. D. Md. 1999). As the trustee appointed  
24 in the debtor's chapter 7 case, plaintiff acquired only those  
25 rights the debtor had when she filed her petition. Id. Since  
26 the debtor did not timely appeal, she no longer had any right to  
27 challenge the judgment entered against her in the State Court  
28 Litigation when she filed her chapter 7 petition. Likewise, the

1 plaintiff acquired no such right. Therefore, for the foregoing  
2 reasons, defendant's claim will not be disallowed in its  
3 entirety. However, it will be adjusted in the manner set forth  
4 below.

5           2.   Classification

6           Plaintiff next objects to the secured status of defendant's  
7 claim stated in its proof of claim. The liens created by the  
8 abstracts of judgment that defendant recorded in Yolo, Solano,  
9 Sacramento, and Los Angeles Counties have all been released. The  
10 lis pendens was also expunged and released. And the River Road  
11 Property has been sold. As a result, there is no security for  
12 defendant's claim. Therefore, plaintiff's objection to the  
13 secured status of defendant's claim will be sustained in part.  
14 Defendant's claim shall be designated as an allowed general  
15 unsecured claim in its entirety.

16           3.   Amount

17           Plaintiff further objects to the amount of defendant's  
18 claim. Plaintiff asserts that the amount stated in defendant's  
19 proof of claim - \$834,968.45 - is overstated. The court agrees.

20           The judgment entered against the debtor in the State Court  
21 Litigation is \$731,387.43. Defendant has failed to substantiate  
22 any amount in excess of the judgment amount. See Fed. R. Bankr.  
23 P. 3001(c)(2)(A). Therefore, the court sustains this objection,  
24 in part, and disallows \$103,581.02. Defendant's general  
25 unsecured claim shall be reduced to \$731,387.43.

26           E.   Sixth Claim for Relief (Equitable Subordination)

27           The sixth claim for relief is an equitable subordination  
28 claim under § 510(c). Section 510(c) states that "the court may-

1 under principles of equitable subordination,  
2 subordinate for purposes of distribution all or part of  
3 an allowed claim to all or part of another allowed  
claim or all or part of an allowed interest to all or  
part of another allowed interest[.]

4 11 U.S.C. § 510(c)(1).

5 The proponent of subordination bears the burden of proving:  
6 (1) the claimant who is to be subordinated engaged in inequitable  
7 conduct; (2) the misconduct results in injury to competing  
8 claimants or an unfair advantage to the claimant to be  
9 subordinated; and (3) subordination is not inconsistent with  
10 bankruptcy law. Paulman v. Gateway Venture Partners, III, L.P.  
11 (In re Filtercorp), 163 F.3d 570, 583 (9th Cir. 1998). Plaintiff  
12 has failed to carry its burden on the first and second elements.

13 The conduct pegged as inequitable is the defendant's  
14 decision to not cooperate with the plaintiff and voluntarily  
15 release its lis pendens/lien on the River Road Property. However,  
16 based on a review of the evidence, the court is persuaded  
17 defendant decided not to sign the lis pendens/lien release  
18 documents because it was unfamiliar with bankruptcy law, and it  
19 lacked sufficient information about the sale of and other  
20 proceedings affecting the River Road Property to allow it to make  
21 an informed decision about its claim in the bankruptcy process  
22 and its rights under the Bankruptcy Code. Defendant's decision  
23 to not voluntarily surrender to the trustee, under these  
24 circumstances, is not inequitable. See Misty Management Corp. v.  
25 Lockwood, 539 F.2d 1205, 1215 (9th Cir. 1976) (stating that the  
26 Bankruptcy Code does not penalize a creditor for not surrendering  
27  
28

1 voluntarily).<sup>7</sup>

2 Therefore, for the foregoing reasons, on the sixth claim for  
3 relief judgment will be entered for the defendant and against the  
4 plaintiff and defendant's claim will not be equitably  
5 subordinated.

6 F. Seventh Claim for Relief - Slander of Title

7 The seventh claim for relief alleges a slander of title  
8 claim. The claim is limited to the lis pendens recorded against  
9 the River Road Property.<sup>8</sup> The elements of a claim for slander of  
10 title under California law are (1) publication, (2) falsity, (3)  
11 absence of privilege and (4) disparagement of another's land  
12 which is relied upon by a third party and which results in a  
13 pecuniary loss. Smith v. Commonwealth Land Title Ins. Co., 177  
14 Cal. App. 3d 625, 630 (1986) (quoting Appel v. Burman, 159 Cal.  
15 App. 3d 1209, 1214 (1984)). Plaintiff has failed to carry his  
16 burden of demonstrating reliance by a third party that resulted  
17 in pecuniary loss to the estate.

18 The court is not persuaded that a third party's reliance on  
19

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20  
21 <sup>7</sup>As explained above, the court is also unable to conclude  
22 that defendant's conduct harmed any other creditor or provided  
23 defendant with some unfair advantage in the debtor's chapter 7  
24 case. If anything, as is also explained above, defendant's  
conduct netted the estate an additional \$59,000 more than it  
would have received from the sale of the River Road Property to  
Ms. Stefanik for \$612,000 in September 2015.

25 <sup>8</sup>Plaintiff improperly attempts to expand the claim in his  
26 trial brief which contradicts the amended complaint and argues  
27 that the slander of title claim includes the lis pendens and the  
28 liens created by the recorded abstracts of judgment. Inasmuch as  
the latter is not alleged as a basis of liability in the amended  
complaint, the court does not consider it included in the seventh  
claim for relief.

1 the lis pendens resulted in a pecuniary loss to the estate. For  
2 example, even while subject to the lis pendens in August 2015  
3 there was substantial interest in the River Road Property.  
4 Indeed, during that time plaintiff received multiple offers to  
5 purchase the property. The lis pendens also did not cause Ms.  
6 Stefanik to withdraw her offer or cancel her contract to purchase  
7 the River Road Property. Ms. Stefanik signed the buy-sell  
8 agreement in August of 2015 and remained the buyer both before  
9 and after the lis pendens was expunged and released. Ms.  
10 Stefanik also appeared on January 12, 2016, fully prepared to  
11 perform under the buy-sell agreement only to be outbid by Kosla  
12 who purchased the property for \$730,000. And while the  
13 defendant's decision to not release the lis pendens on the River  
14 Road Property delayed the sale and required the estate to expend  
15 resources, as explained above, that proved to be a benefit to the  
16 estate insofar as the delay netted the estate \$59,000 more than  
17 it would have received had the plaintiff sold the River Road  
18 Property to Ms. Stefanik for \$612,000 in September 2015.

19 Therefore, for the foregoing reasons, judgment on the  
20 seventh claim for relief will be entered for the defendant and  
21 against the plaintiff with plaintiff taking nothing on the  
22 slander of title claim.

#### 23 **IV. CONCLUSION**

24 Based on the above, judgment will be entered as follows:

25 (1) dismissing the first and second claims for relief as  
26 moot;

27 (2) for the defendant and against the plaintiff on the  
28 third, fourth, sixth, and seventh claims for relief;

1 (3) for the plaintiff, in part, and against the defendant,  
2 in part, on the fifth claim for relief whereby defendant's claim  
3 as stated in its proof of claim shall be deemed an allowed  
4 general unsecured claim in the amount of \$731,387.43; and

5 (4) denying with prejudice plaintiff's request for  
6 attorney's fees.

7 Dated: August 22, 2016.

8  
9   
10 UNITED STATES BANKRUPTCY JUDGE

**INSTRUCTIONS TO CLERK OF COURT  
SERVICE LIST**

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

Dana A. Suntag  
5757 Pacific, #222  
Stockton CA 95207

Kevin A. Hughey  
980 9th St 16th Fl  
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